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Issue Date: 14 October 2005

In the Matter of

Case No.: 2004 BLA 05299

KENNEDY RICE, JR.
Claimant

v.

U.S. STEEL MINING
Employer

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party-In-Interest

Patrick Nakamura, Esq.
Birmingham, AL
For the Claimant

James N. Nolan, Esq.
Justin Davis, Esq.
Birmingham, AL
For the Employer

Before: JEFFREY TURECK
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This is a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. 901 *et seq*. (hereafter "the Act"). The claim was filed on January 10, 2003, and was denied by the Office of Workers' Compensation Programs ("OWCP"). U.S. Steel Mining Company was designated as the responsible operator by OWCP. At the request of the claimant, a formal hearing was held in Birmingham, Alabama on April 18, 2005. The issues contested by the employer were pneumoconiosis, causal relationship, total disability and causation.

Based on the evidence contained in the record of this proceeding, I find that the claimant is not entitled to benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW[1]

The claimant is 58 years old and divorced. He has no dependents under the Act. Claimant is a Viet-Nam War veteran. He is a high school graduate and, according to Dr. Goldstein, claimant completed two years of college (DX 2; EX 1, at 2). The parties stipulated that claimant worked as a coal miner for 32 years (TR 5). All of his coal mine work was with U.S. Steel Mining (DX 6), and virtually all of it involved working at the face in extremely dusty conditions (TR 14-19). Although claimant sometimes used an air stream helmet, he testified that the dust still got through (TR 20). He also testified that the work, particularly on the long wall, required heavy physical exertion (TR 21-22).

Although claimant's official retirement from U.S. Steel Mining did not occur until 2003 (TR 31), he last worked in March, 2000, when he suffered a heart attack (DX 2; EX 1, at 1). He had bypass surgery soon after suffering the heart attack (TR 22-23). In addition to his heart disease (coronary artery disease and ischemic cardiomyopathy), claimant suffers from hypertension, diabetes with neuropathy, degenerative joint disease, a herniated cervical disc, abnormal liver function and other conditions (TR 28-29; CX 3). Finally, claimant has a very limited history of cigarette smoking. He started smoking when he went into the Marines in 1966, and continued until the early 1970's. He smoked only a few cigarettes a day during that time (TR 23).

In order to be entitled to benefits, claimant must prove that he has pneumoconiosis arising out of coal mine employment and is totally disabled by that disease. Since this claim was filed after January 19, 2001, the regulations contained in 20 C.F.R. Part 718 and Part 725 as amended in 2001 are applicable to determine entitlement to benefits.[2] Under §718.201(a), pneumoconiosis may be either "clinical" -- "those diseases recognized by the medical community as pneumoconiosis;" or "legal" – "any chronic lung disease or impairment and its sequelae arising out of coal mine employment."

Under §718.202(a), claimant can establish the existence of pneumoconiosis by x-ray, biopsy or autopsy evidence, or by the reasoned opinion of a physician. There is no relevant biopsy evidence and, of course, no autopsy evidence, so the x-rays and medical reports must be considered. In regard to x-ray evidence, the record contains nine substantive x-ray readings.[3] Two of these readings, by Dr. Underwood of a June 11, 2003 x-ray (DX 11), and Dr. Moss (CX 4) of a September 11, 2003 x-ray, are ambiguous in that neither doctor stated that the x-rays were negative for pneumoconiosis, but neither doctor mentions pneumoconiosis or makes any findings consistent with pneumoconiosis. Further, neither doctor's qualifications are in the record. The opinions of Drs. Moss and Underwood have little probative value. The remaining readings are of a February 10, 2003 x-ray by Drs. Ballard (DX 9), Fino (DX 10) and Ahmed (CX 1); and of a December 28, 2004 x-ray by Drs. Goldstein (EX 1), Rosenberg (EX 3), Cappiello (CX 5) and Ahmed (CX 6). Drs. Ballard, Ahmed (CX 6) and Cappiello (CX 5) are board-certified

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[1] Citations to the record of this proceeding will be abbreviated as follows: CX – Claimant's Exhibit; EX – Employer's Exhibit; DX – Director's Exhibit; TR – Hearing Transcript.

[2] All of the regulations cited in this decision are contained in Title 20 of the Code of Federal Regulations.

[3] Dr. Goldstein reviewed the February 10, 2003 x-ray for quality only as part of the Department of Labor's examination performed by Dr. Hawkins.

radiologists and B-readers (Government-certified experts in interpreting x-rays for pneumoconiosis);[4] Drs. Fino (EX 5), Goldstein (EX 2) and Rosenberg (EX 4) are board-certified pulmonary specialists and B-readers. Drs. Ballard, Ahmed and Cappiello found claimant's x-rays to be positive for pneumoconiosis, category 1/0, the lowest positive x-ray diagnosis of the disease, whereas Drs. Fino, Goldstein and Rosenberg found these same x-rays negative for pneumoconiosis.

Since Dr. Ahmed read both the February 10, 2003 and December 28, 2004 x-rays, there is one more positive B-reading than negative B-readings in the record. But I do not find this extra reading to be significant, for the same number of B-readers found claimant's x-rays positive and negative. Moreover, I do not subscribe to the theory that the x-ray interpretations of board-certified radiologists are entitled to greater weight than those of board-certified pulmonary specialists. Section 718.202(a)(1) states that "in evaluating [conflicting] X-ray reports consideration shall be given to the radiological qualifications of the physicians interpreting such X-rays." No evidence has been presented to suggest that board-certified radiologists, who spend their time reading x-rays of the entire body, have greater expertise in interpreting chest x-rays than board-certified pulmonary specialists, who see nothing but chest x-rays in their practice. In adopting §718.202(a)(1), the Department of Labor specifically rejected a proposal to "limit relevant radiological qualifications to board-certification in radiology and certification as a B-reader." *See* 65 F.R. 245, at 79945 (Dec. 20, 2000). That so many pulmonary specialists also are B-readers is indicative of their expertise in interpreting x-rays for pneumoconiosis.

This is one of those rare cases where the x-ray evidence is truly in equipoise. Since it is the claimant's burden to prove the elements of entitlement (*see Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 18 BLR 2A-1 (1994)), he has failed to prove the existence of pneumoconiosis by x-ray evidence.

Under §718.202(a)(4), pneumoconiosis can be proven "if a physician, exercising sound medical judgment, *notwithstanding a negative X-ray*, finds that the miner suffers . . . from pneumoconiosis . . . ." (Emphasis added.)[5] On February 10, 2003, Dr. Hawkins, a board-certified pulmonary specialist (CX 4), conducted the examination provided to claimants by the Department of Labor (DX 9). Dr. Hawkins took medical and employment histories from the claimant, conducted pulmonary function and blood gas studies, and had a chest x-ray taken and interpreted by Dr. Ballard. As was noted above, Dr. Ballard found the x-ray positive for category 1/0 pneumoconiosis, whereas the blood gas test produced normal values both before and during exercise. In regard to the pulmonary function testing, the February 10, 2003 study produced FVC and FEV1 values qualifying for presumed total disability under Appendix B to Part 718 for a man claimant's age and height, but was found to be invalid by a Department of Labor consultant. So on April 8, 2003, another pulmonary function test was run which produced very similar qualifying values. This test also was found to be invalid. Finally, Dr. Hawkins

[4] Dr. Ballard's *curriculum vitae* is not in evidence; but his letterhead states that he is a B-reader (DX 9), and both parties list him as a board-certified radiologist and B-reader in their post-hearing briefs.

[5] Although CT scans are considered under this subsection, there are no CT scan interpretations in the record. The record does contain the reports of MRI examinations of the claimant's shoulders, brain and cervical spine (CX 3). Although MRIs presumably would be considered under this subsection as well, the MRIs of claimant's shoulders, brain and neck are not relevant to this case.

conducted an EKG test, which produced abnormal results apparently indicative of heart disease.[6] Based on the results of his examination, Dr. Hawkins concluded that the claimant had pneumoconiosis, asthmatic bronchitis and atherosclerotic vascular disease producing a minimal to mild respiratory impairment.

Dr. Hawkins's report, which is dated February 20, 2003, has little probative value. For the only reason he gives for this diagnosis of pneumoconiosis is the positive x-ray interpretation (*see* DX 9, p.4, Box D6 of the Department of Labor black lung examination form), which is contrary to the dictates of §718.202(a)(4). Further, to the extent he may have utilized the pulmonary function studies in reaching the opinions expressed in his report, they are invalid. He appears to have believed them to be valid, yet paradoxically, despite the very low, qualifying results he found only a minimal to mild impairment. Further, valid pulmonary function studies conducted on May 13, 2004 by Dr. Khan (EX 6) and December 28, 2004 by Dr. Goldstein (EX 1) produced much higher, non-qualifying values. Moreover, Dr. Hawkins's primary pulmonary diagnosis – asthmatic bronchitis – was made despite the absence of post-bronchodilator ventilatory studies (*see* discussion of Dr. Goldstein's report, *infra*), and he states that the source of the asthmatic bronchitis is claimant's cigarette smoking and "environmental irritants." But in light of claimant's very minor cigarette smoking history, which Dr. Hawkins lists as less than a pack a day from 1968 to 1972, it is hard to understand how he found it to be a cause of the asthmatic bronchitis in 2003; and he does not identify the environmental irritants he refers to. Thus, Dr. Hawkins's report is seriously flawed.

Also in evidence are the claimant's medical records from Dr. Ford (who is also referred to as Dr. Matthews-Ford), who appears to have become claimant's primary care physician in early 2002 (CX 3). Dr. Ford has treated the claimant for all of the medical conditions listed at the beginning of this decision. From March 22, 2002 through January 24, 2003, Dr. Ford, in the "Problem List" section of her reports, lists interstitial lung disease, interstitial lung disease secondary to coal dust exposure, or interstitial lung disease with newly diagnosed silicosis. But none of these conditions are mentioned in the "Impression" section of her reports, which follow her examination findings. Therefore, it is unclear whether any of these diagnoses of interstitial lung disease are her diagnoses or merely information related to her as part of the miner's medical history. Further complicating the matter is that her reports after January 24, 2003 do not mention interstitial lung disease. Accordingly, I cannot find that Dr. Ford diagnosed the miner with interstitial lung disease in general or pneumoconiosis in particular.

The employer submitted the medical reports of two pulmonary specialists, Drs. Goldstein (EX 1) and Rosenberg (EX 3). Dr. Goldstein conducted a pulmonary examination of the claimant on December 28, 2004. He obtained accurate work and smoking histories; took a chest x-ray which he interpreted as negative for pneumoconiosis; conducted ventilatory studies which showed significant restriction before bronchodilators qualifying for presumed total disability under Appendix B to Part 718, with substantial improvement to non-qualifying values after

[6] Dr. Hawkins reported the results of his examination on a Department of Labor black lung examination form. As is usually the case when the Department of Labor form is used instead of having the doctor prepare a narrative report, the doctor's opinion is expressed cryptically and somewhat illegibly.

bronchodilators, leading Dr. Goldstein to conclude there might be some obstruction as well;[7] blood gas testing at rest which produced values well in excess of those needed to qualify as totally disabled under Appendix C to Part 718; and an abnormal EKG. Based on this evidence, Dr. Goldstein concluded that the claimant did not have pneumoconiosis or any other dust disease of the lungs. He placed great emphasis on his negative x-ray reading in reaching this conclusion which, in light of the equally positive and negative x-ray interpretations, is problematic. But the post-bronchodilator ventilatory study results led him to state that the claimant may have asthma. Moreover, he stated that the claimant had cardiac enlargement, which is the most likely cause of his shortness of breath. Dr. Goldstein's opinion is consistent with the evidence provided by his examination, and is probative.

The record also contains the February 11, 2005 consultative report of Dr. Rosenberg, who did not examine the claimant but appears to have reviewed all of the medical evidence in the record at that time (EX 3).[8] In addition, Dr. Rosenberg personally interpreted the December 28, 2004 x-ray. It should be pointed out that Drs. Ahmed and Cappiello did not reread the December 28, 2004 x-ray until March, 2005. Based primarily on his own x-ray interpretation of no evidence of past coal dust exposure; the absence of rales on auscultation; normal diffusing capacity; and preserved PO2 with exercise; Dr. Rosenberg concluded that the claimant does not have legal or clinical pneumoconiosis (*id*. at 4). He then stated that the claimant's restriction shown on the pulmonary function tests was severe enough to prevent him from performing his last coal mine job, but this is related to his "significant coronary artery disease, with his last measured left ventricular ejection fraction being reduced to 30%." *Id***.** at 5. Dr. Rosenberg's opinion likewise is probative evidence that the claimant does not have pneumoconiosis.

Although none of the medical opinions are without significant flaws, the more probative reports were those of Drs. Goldstein and Rosenberg. Therefore, I find that the evidence fails to prove that the claimant has pneumoconiosis under §718.202(a)(4). Thus the evidence fails to prove that the miner has pneumoconiosis, and benefits must be denied.

ORDER

IT IS ORDERED that the claim for black lung benefits of Kennedy Rice, Jr., is denied.

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JEFFREY TURECK
Administrative Law Judge

[7] Although on page 3 of his report Dr. Goldstein stated that the before bronchodilator test suggests obstruction and the after bronchodilator test showed obstruction, it is clear that he meant to say that the before bronchodilator test showed restriction. In this regard, see p.4 of his report.

[8] In his report, Dr. Rosenberg states that: "It was noted that Dr. Gaziano reviewed a chest X-ray dated October 22, 2001. He felt there were q/p abnormalities in all lung zones with a profusion of 1/0." EX 3, at 3. He does not state who it was that noted the existence of an x-ray reading by Dr. Gaziano. I have combed the record and cannot find a reference to an x-ray reading by Dr. Gaziano, let alone an actual x-ray reading prepared by Dr. Gaziano. Further, neither of the parties made any reference to an x-ray interpretation by Dr. Gaziano at any time during this proceeding.